

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOHN EUGENE BEARD,

Defendant-Appellee.

UNPUBLISHED

March 23, 2001

No. 225390

Macomb Circuit Court

LC No. 1999-002990-AR

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOYCE ANN SMITH,

Defendant-Appellee.

No. 225391

Macomb Circuit Court

LC No. 1999-002991-AR

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

HARRY JAMES MAHERN,

Defendant-Appellee.

No. 225392

Macomb Circuit Court

LC No. 1999-002992-AR

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KAREN ANNE BRUCE,

Defendant-Appellee.

No. 225393

Macomb Circuit Court

LC No. 1999-002993-AR

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JAMES FREDERICK TERRY,

Defendant-Appellee.

No. 255394

Macomb Circuit Court

LC No. 1999-002994-AR

Before: Zahra, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

The prosecutor appeals by delayed leave granted a circuit court order affirming a district court's order quashing a search warrant and suppressing evidence seized pursuant to the warrant. We reverse and remand.

Defendants were charged with violating various provisions of Michigan's gambling laws, including operating a gambling house, possessing gambling paraphernalia, and conspiracy. Pursuant to a search warrant issued on October 20, 1998, the police that day raided the Capital Club in Warren and seized video blackjack and slot machine games and other gambling paraphernalia. Before their preliminary examination, defendants moved to quash the search warrant and suppress the evidence seized. The district court granted the motion, and the circuit court affirmed the district court, on the basis that the affidavit in support of the search warrant did not contain sufficient facts to warrant a finding of probable cause.

The prosecutor first contends that the circuit and district courts erred in ruling that the affidavit's information concerning events that allegedly occurred up to eight days before the warrant's issuance was stale. "[A]ppellate scrutiny of a magistrate's decision involves neither de novo review nor application of an abuse of discretion standard." *People v Whitfield*, 461 Mich

441, 445; 607 NW2d 61 (2000), quoting *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). A magistrate's decision regarding probable cause should be afforded great deference by reviewing courts, and the inquiry on appeal should be limited to "whether a reasonably cautious person could have concluded that there was a 'substantial basis'" for finding "that a search would uncover evidence of wrongdoing." *Whitfield, supra* at 445-446, quoting *Russo, supra* at 603, 604. "[A] search warrant and the underlying affidavit are to be read in a common-sense and realistic manner." *Whitfield, supra* at 446, quoting *Russo, supra* at 604.

Probable cause to search must exist at the time a warrant is issued. *People v Stumpf*, 196 Mich App 218, 227; 492 NW2d 795 (1992). Probable cause to issue the warrant exists when there is a substantial basis for inferring a fair probability that contraband or evidence of a crime will be found in a particular place. *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000). Staleness must be considered in determining whether probable cause for a search exists. *Stumpf, supra* at 226. The age of the information is not itself determinative, but must be considered together with factors such as

whether the crime is a single instance or an ongoing pattern of protracted violations, whether the inherent nature of a scheme suggests that it is probably continuing, and the nature of the property sought, that is, whether it is likely to be promptly disposed of or retained by the person committing the offense." [*Id.*, quoting *Russo, supra* at 605-606.]

Generally, a search warrant may not issue when a substantial delay occurs between the observation of criminal activity and the attempt to obtain a warrant, unless intervening facts give reasonable cause to believe that the criminal activity is continuing and presently occurring. *People v Broilo*, 58 Mich App 547, 550; 228 NW2d 456 (1975).

We conclude that the facts set forth in the affidavit for the search warrant are sufficient to justify a finding of probable cause to search the Capital Club for evidence of illegal gambling. The affidavit indicated that (1) after an August¹ police investigation of the Ambassador Club, a known, illegal gambling establishment located in Eastpointe, the police seized video poker machines, ledgers, records "and evidence linking the Ambassador Club . . . with the Capital Club," (2) "[w]ithin the past eight days," an undercover officer obtained entry into the Capital Club and "observed and participated in various forms of illegal gambling,"² (3) on October 20,

¹ Although the affidavit does not specify August of what year, we assume the affiant intended August 1998.

² The affidavit specified that the undercover officer

observed electronic gambling machines within the building. The machines mechanically accept bills of U.S. currency and then credit points to the player equal to the amount of currency placed into the machine. [The officer] further observed that an attendant pays cash to players of these machines in the amount of their accumulated winnings at the conclusion of play. [The officer] further observed individuals playing cards and tables set up for the purpose of card playing.

1998, the day of the police raid of the Capital Club, a police surveillance crew “observed persons entering and exiting and . . . an activity level consistent with that observed during” the undercover officer’s investigation, and (4) on April 16, 1998 police executed a search warrant at the Capital Club, finding video blackjack and slot machines;³ the Club’s owner advised police that he merely taught people how to gamble. Reading the affidavit and search warrant in a common sense and realistic manner, a reasonably cautious person could have concluded that there was a substantial basis for finding that a search of the Capital Club would uncover evidence of illegal gambling. *Whitfield, supra* at 446.

Although in some cases an eight-day delay between the time criminal activity was observed and the warrant executed would render the observations unreliable, we conclude that in this case the fact that the undercover officer’s observations occurred sometime within an eight-day period preceding the warrant’s issuance does not undermine a finding of probable cause. In light of the noted April, August and October 1998 links between the Capital Club and illegal gambling, the illegal gambling activities appeared part of an ongoing pattern of criminal activity. *Stumpf, supra* at 226. Furthermore, considering this background information, the fact that on the day the search warrant was issued the police observed activity consistent with that previously observed by the undercover police officer supported a reasonable belief that illegal gambling continued at the time that the search warrant issued. *Id.* We additionally note that the electronic gambling machines involved were not likely property that would have been promptly disposed of within eight days after the undercover officer’s observation of them, especially in light of the suggestion that the Capital Club had operated as an illegal gambling establishment for some period of time. *Id.*

Accordingly, we hold that the district and circuit courts erred in concluding that because the affidavit’s information was stale, the affidavit did not support a reasonable determination by the magistrate that a substantial basis existed for finding probable cause. *Whitfield, supra* at 446. Given our conclusion that the search warrant was based on probable cause, we need not need resolve the prosecutor’s additional appellate issues.

³ In support of their motion to suppress the evidence seized pursuant to the warrant, defendants argued before the district court that the affidavit’s statement regarding the April 1998 police raid was a misrepresentation. Neither the district court nor the circuit court addressed this issue. Furthermore, we detect no record evidence that the affiant knowingly or recklessly injected false information into the affidavit. See *Stumpf, supra* at 224, holding as follows:

In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause.

Even assuming that the affidavit’s allegation of an April 1998 raid at the Capital Club was false or misleading, we would conclude that the remainder of the affidavit supported the issuance of a search warrant.

We reverse the circuit and district courts' orders excluding evidence of illegal gambling obtained pursuant to the October 20, 1998 warrant, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Michael R. Smolenski

/s/ Hilda R. Gage